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No. 08-1375

In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

We explain in more detail below the legal points on which respondents' brief in opposition goes astray. But the most notable thing about the brief is an omission: respondents barely even attempt to deny that the Sixth Circuit's approach would substitute litigation for the efficient, low-cost administrative process that is now the central element of *all* state workers' compensation programs. Because this holding would substantially undermine the efficacy of state workers' compensation regimes – and because the decision below also departs in material and destructive ways from this Court's decisions construing the McCarran-Ferguson Act – further review is warranted.

A. The Holding Below Will Undermine Workers' Compensation Systems

To begin with, respondents are manifestly wrong in their blithe assertion that the decision below will not have significant and far-reaching real-world consequences. Until this point, the defining characteristic of workers' compensation has been the way in which it is walled off from the system of litigation. The essential bargain of workers compensation is its use of a quick, efficient, and low-cost administrative process that provides broad but limited benefits: "Workers' compensation regimes * * * provide something for employees – they ensure limited fixed payments for on-the-job injuries – and something for employers – they remove the risk of large judgments and heavy costs generated by tort litigation." *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 663 (2006).

But as we show in the petition (at 30-33) and as the *amici* supporting the petition demonstrate in detail (see, *e.g.*, Chamber Br. 12-15; Mich. Defense Trial Counsel ("MDTC") Br. 17-20) – and as respondents very notably do not deny – the Sixth Circuit's holding would turn this principle on its head. The court of appeals' rule would allow all disgruntled workers' compensation claimants who allege improper motives by their employers to bring suit in federal court. The attractiveness of the generous federal RICO remedies will encourage such litigation, which in turn will require federal courts to substitute their judgment for that of the expert decision-makers ordinarily entrusted with resolution of workers' compensation disputes. See DRI Br. 6. This is not a theoretical prospect; the Court has recognized in closely related contexts that the prospect of prolonged and expensive litigation encourages a proliferation of strike suits. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-59 (2007) (antitrust); *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (securities).

This development will vastly add to the expense and detract from the efficacy of the workers' compensation process. Respondents make no pretense that a decision leading to such an outcome is consistent with settled law: they point to *no* decision (other than the one below) allowing use of a federal cause of action to challenge the denial of state workers' compensation benefits, and we are aware of none. Yet many such suits unquestionably are coming in the wake of the Sixth Circuit's ruling: *amicus* Chamber of Commerce points to a number of such suits that already have been brought against some of the Nation's leading employers (Br. 14), and more have

since followed. See, *e.g.*, *Gianzero* v. *Wal-Mart Stores, Inc.*, No. 09-cv-00656 (D. Colo. filed Mar. 24, 2009).

Respondents do maintain that the Court should await development of a clear conflict in the circuits on the question presented here before granting review. Opp. 1, 6. But whatever the usual wisdom of that course, there is no reason for delay here. Even as confined to the Sixth Circuit, the holding below affects well over 10 million workers, hundreds of thousands of employers, and (potentially) many billions of dollars in annual workers' compensation claims. See MDTC Br. 17-18. It also will likely affect the primary activities of businesses that are forced to abandon self-insurance in response to the Sixth Circuit's decision. *Id.* at 18-20. Yet this Court may have limited opportunities to review the issue in the future, as the prospect of enormous class action RICO liability may lead employers to settle rather than fully litigate strike suits. See Chamber Br. 14-15. And there is nothing to be gained from delay; both sides of the legal arguments are presented by the conflicting decisions of the district court and the court of appeals in this case. In these circumstances, "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring).[1]

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[1] Respondents also are wrong in urging denial of review on the ground that the Sixth Circuit's decision is interlocutory. Opp. 1, 19-20. The issue presented here is one of pure law and has been finally resolved by the court of appeals; whatever happens on remand, that decision will remain on the books to govern conduct in the Sixth Circuit. Interlocutory posture is no "impediment to certiorari" when the decision below "has decided an

B. The Sixth Circuit's Decision Cannot Be Reconciled With Holdings Of This Court

The need for immediate review is particularly sharp because the Sixth Circuit departed from this Court's guidance in several significant respects.[2]

1. *Workers' compensation programs that transfer risk regulate the business of insurance.*

First, respondents are simply wrong in asserting categorically that workers' compensation does not involve "insurance." Opp. 7-9. Quite the contrary is so: the Court has generically described workers' compensation regimes as "a compulsory *insurance* system," has referred to the requirement that employers provide (or obtain) "workers' compensation *insurance*" – and because "[s]elf-insured employers and private insurers face identical obligations under [a workers' compensation system substantially identical to Michigan's], [the Court] therefore [has] refer[red] to them collectively as '*insurers*' or '*private insurers*.'" *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 44 & n.1 (1999) (emphasis added).

There is no mystery why this is so. In Michigan, as in most States, risk-shifting workers' compensation terms are implied into every employment con-

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important issue, otherwise worthy of review," and resolution of that issue by the Court "may serve to hasten or finally resolve the litigation." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 4.18, at 282 (9th ed. 2007).

[2] Respondents suggest that review should be denied because the court of appeals offered several alternative bases for its holding. Opp. 1, 17. But the Sixth Circuit's decision surely cannot be insulated from review because the court erred not in one, but in several related respects.

tract, and a contract whose risk-shifting terms are fixed by statute is nonetheless an insurance contract. See *Arroyo-Melecio* v. *Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 62, 68-69 (1st Cir. 2005) (holding that claims challenging operation of "compulsory [automobile] liability insurance" scheme were claims about the "business of insurance").[3] In this respect, respondents misstate our argument when they contend, repeatedly, that we are contesting the Sixth Circuit's reading of state law (Opp. 1, 6-7); the Sixth Circuit's error was in its misreading of the *federal-law* consequences of state rules found across the Nation.

Respondents' principal response to this point is their insistence that, "[b]ecause it replaces a preexisting duty, the workers' compensation scheme does not transfer risk from an insured to an insurer." Opp. 11. But this, too, is simply wrong. In fact, prior to the creation of workers' compensation "only a small percentage of injured workers received *any* recovery." *Howard Delivery*, 547 U.S. at 671 (Kennedy, J., dissenting) (emphasis added). See Chamber Br. 9-10; MDTC Br. 13 (prior to workers' compensation laws, no more than 20% of injured workers received compensation). At that time, the employee "assumed the entire risk of injury in ordinary cases," "leaving

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[3] The contrary decisions cited by respondents (Opp. 8 n.2) construed state laws that did not treat the workers' compensation obligation as implied in the employment contract. See, *e.g.*, *Harrison* v. *Digital Health Plan*, 183 F.3d 1235, 1241 (11th Cir. 1999) (per curiam) (statement that "[w]orkers' compensation is not insurance" premised on understanding that workers' compensation is *not* "based on a contract implied by law between the employer and the employee"); *Wash. Ins. Guar. Ass'n* v. *Dep't of Labor*, 859 P.2d 592, 595 (Wash. 1993) (conclusion based on view that, under Washington law, workers' compensation "is not the equivalent of a contract").

the entire loss to rest where it may chance to fall." *N.Y. Cent. R.R.* v. *White*, 243 U.S. 188, 204 (1917)). Workers' compensation doubtless *replaced* these tort regimes (see *Howard Delivery*, 547 U.S. at 662 (majority opinion)), but in the vast majority of cases its principal effect was the *transfer* to the employer of the risk of injury that previously had rested with the employee. That is the hallmark of insurance.

For the same reason, respondents are incorrect in asserting that workers' compensation regimes cannot be understood to have been enacted for the purpose of regulating the "business of insurance" (Opp. 11-12): if we are correct that regulation of the contractual transfer of the risk of workplace injuries *is* regulation of the business of insurance, the WDCA surely was enacted for the purpose of regulating that business.

2. Self-insurance is part of the business of insurance.

Respondents also depart from McCarran-Ferguson principles and this Court's decisions when they defend the Sixth Circuit's rule that self-insurance is not "insurance." See Opp. 13-16. In fact, "[f]or most purposes [relating to workers' compensation], the position of self-insurers is assimilated to that of insurance carriers." LARSON ON WORKERS' COMPENSATION § 150.01[2] (2007). Under Michigan law (which in this respect is similar to the law of many other States, see Pet. 14 n.2), the obligation to pay workers' compensation benefits arises from risk-allocation provisions that are implied as matter of law into *every* covered employment agreement, whether that agreement is guaranteed by self- or by third-party insurance. There can be no serious dispute that such provisions effect the contractual

transfer of a class of risks from the employee to the employer in the manner of insurance – at the very least, of the risks posed by the substantial majority of workplace injuries for which the employee would otherwise be considered at fault. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). Indeed, many of the authorities cited by respondents (at 13-14 & n.4) agree that transfer of risk is the hallmark of insurance.[4]

Moreover, the contractual transfer of risk under the WDCA – from employees to their employers – operates in precisely the same way whether the employer self-insures or purchases insurance; the WDCA regulates the "actual performance" (*United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 503 (1993)) of this transfer by requiring employers either to purchase insurance or to obtain approval to self-insure. See Mich. Comp. Laws § 418.611; accord *Am. Mfrs.*, 526 U.S. at 44 n.1. Under such state statutes, employers who self-insure and employers who purchase insurance assume identical obligations to compensate employees for covered workplace injuries. Pet. 21. Consequently, "self-insurance in the worker's compensation arena is the functional equivalent of purchasing a commercial insurance policy." *Heinz* v. *Chicago Rd. Inv. Co,*, 549 N.W.2d 47, 54 (Mich. Ct. App. 1996).[5] The McCarran-Ferguson Act should be

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[4] *E.g.*, *Doucette* v. *Pomes*, 724 A.2d 481, 490 (Conn. 1999) ("[The] transfer of risk * * * is generally considered to be an essential element of an insurance relationship."); *Physicians Ins. Co.* v. *Grandview Hosp. & Med. Ctr.*, 542 N.E.2d 706, 707 (Ohio Ct. App. 1988) ("Insurance shifts the risk of loss from an insured to an insurer.").

[5] *McClain* v. *Begley*, 465 N.W.2d 680, 682 (Minn. 1991) ("The law of workers' compensation treats self-insurers no differently

understood to protect the Michigan's legislature's considered judgment that self-insured employers be treated identically to insurance carriers in the administration of workers' compensation benefits. See *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 67, 69 (1959) (concept of "business of insurance" "take[s] on its coloration and meaning largely from state law, from state practice, from state usage").

Indeed, respondents do not even attempt to deny the analogy between employers who self-insure workers' compensation and HMOs. See Pet. 20-21. Like HMOs, self-insured employers are contractually obliged to indemnify others for a class of covered risks, yet do not pass on these risks to a third-party insurer. Nonetheless, there is "no serious question" that HMOs are insurers. See *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 367-79, 373-74 (2002). Respondents' sole response is that *Rush Prudential* considered the Employee Retirement Income Security Act of 1974 (ERISA), and so has no bearing on what practices constitute the "business of insurance" under the McCarran-Ferguson Act. Opp. 15-16. Although respondents are correct that *Kentucky Ass'n of Health Plans, Inc.* v. *Miller*, 538 U.S. 329 (2003), forswore the use of the *Pireno* factors in the ERISA context, nothing in *Miller* undermined *Rush Prudential*'s analysis of the insurance-like features of HMOs. In that connection, the Court's discussion

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than those who insure by commercial policy. The purpose of either form of insurance is to compensate victims appropriately."); see also ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 12[c] (4th ed. 2007) (remarking that self-insurance is often "treated as being equivalent to the 'business of insurance'" when a "statutory scheme require[s] businesses to purchase liability insurance[,] but excus[es] them from the requirement" if they obtain approval to self-insure).

could not be clearer: "HMOs actually underwrite and spread risk among their participants, a feature distinctive to insurance" (536 U.S. at 367), so that "HMO contracts are, in fact, contracts for insurance" (*id.* at 374).

3. The application of RICO would impair state law.

Finally, respondents' discussion confirms that the Sixth Circuit's holding reflects serious confusion about the rule of *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 310 (1999) – or a palpable attempt to evade the decision in that case. There is no doubt that the law of Michigan, like that of virtually all States, does not allow the imposition of special penalties for the assertedly wrongful denial of workers' compensation benefits (see Pet. 26); respondents do not contend otherwise.[6] And respondents offer absolutely no reason to doubt that this state system, which is premised on a streamlined administrative process that precludes litigation, would be "impaired" by the availability of a federal cause of action. See Opp. 18.

Respondents nevertheless contend that *Humana* supports a holding that there is no "impairment" even when state law "'provides materially different

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[6] Under Michigan law, there is no tort remedy for the wrongful withholding of workers' compensation benefits, even if the purpose of doing so was to "further some ulterior motive." *Lisecki* v. *Taco Bell Rests., Inc.*, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986) (per curiam); see Pet. 27-28 & n.8. An employer may dispute its liability for paying benefits without facing any penalties, even if its position was "inconsistent and nonsensical" or pursued in "bad faith." See *Warner* v. *Collavino Bros.*, 347 N.W.2d 787, 789-90 (Mich. Ct. App. 1984) (per curiam); *Couture* v. *Gen. Motors Corp.*, 335 N.W.2d 668, 670 (Mich. Ct. App. 1983) (per curiam).

remedies'" than federal law for the same conduct. Opp. 19 n.6 (quoting *Humana*, 525 U.S. at 305). But the quoted passage comes from the *Humana* Court's paraphrase of the question presented in that case. The Court's *actual* holding turned on the *absence* of material differences in the remedies provided by Nevada insurance law and RICO. Nevada permitted both statutory and common-law claims for insurance fraud, under which punitive damages were available. *Id.* at 313-14. Indeed, under Nevada law, plaintiffs were eligible to receive damages "*exceeding* the treble damages available under RICO." *Id.* at 313 (emphasis added). Thus, it was easy to conclude that the remedies available under RICO would "complement," rather than impair, Nevada's remedial regime. *Ibid.*

That manifestly is not the case here.[7] The WDCA, like most workers' compensation statutes, creates a "hermetically sealed" (cf. *Humana*, 525 U.S. at 312) administrative regime providing limited and exclusive remedies for workplace injuries. *See* ATA Br. 15-19; DRI Br. 9-13. In Michigan, the "pri-

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[7] It also was not so in *American Chiropractic Ass'n* v. *Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir. 2004), and *BancOklahoma Mortgage Corp.* v. *Capital Title Co.*, 194 F.3d 1089 (10th Cir. 1999). Respondents mischaracterize (Opp. 19 n.6) those decisions as cases in which courts "rejected reverse preemption where state law provides no remedy at all." In fact, although state *insurance* laws did not provide remedies in those cases, it was crucial to the decisions that *other* state laws *did*. See *Am. Chiropractic*, 367 F.3d at 232; *BancOklahoma*, 194 F.3d at 1099-1100. By contrast, when "state insurance laws closely regulate the very activity forming the basis of a plaintiff's claim, '[t]he absence of a state-level cause of action counsels in favor of barring the federal lawsuit.'" *In re Managed Care Litig.*, 185 F. Supp. 2d 1310, 1322 (S.D. Fla. 2002); accord *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999).

mordial intent" of the "exclusivity provision" in the WDCA was that, in exchange for assuming the obligation to compensate employees for workplace injuries on a no-fault basis, employers would receive "outright and absolute immunity from liability (*except as provided in the [WDCA]*) stemming from each compensable injury." *Downie* v. *Kent Prods., Inc.*, 362 N.W.2d 605, 613 (Mich. 1984) (emphasis added). Superposing RICO liability on top of the WDCA's "limited and determinate" administrative remedies (*Simkins* v. *Gen. Motors Corp.*, 556 N.W.2d 839, 844 (Mich. 1996)), as the Sixth Circuit thought permissible, does grave violence to Michigan's regulatory regime. If that outcome really is consistent with *Humana*, it should be this Court, and not the Sixth Circuit, that says so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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